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13 **IN THE UNITED STATES DISTRICT COURT**
14 **FOR THE EASTERN DISTRICT OF WASHINGTON**

15 ALLIANCE FOR THE WILD)
16 ROCKIES,)

17)
18 Plaintiff,)

19 v.)

20)
21 JIM PENA, in his official capacity as)
22 Regional Forester of Region Six U.S.)
23 Forest Service, UNITED STATES)
24 FOREST SERVICE, an agency of the)
25 United States, and RODNEY)
26 SMOLDON, in his official capacity as)
27 Supervisor of the Colville National Forest)

28 Defendants.)
29)

Case No.: 2:16-CV-294-RMP

**PLAINTIFF'S MOTION TO
RETAX COSTS**

12/10/18

Without Oral Argument

Pursuant to new LCivR 54(d)(1)(D), Plaintiff Alliance for the Wild Rockies (“Alliance”) hereby files this Motion to Retax Costs taxed by the Clerk of Court (ECF No. 120). The new rules “are effective October 1, 2018 and apply to all pending and future cases”¹

I. THE COST BILL SHOULD BE REVERSED BECAUSE OF NONCOMPLIANCE WITH THE LOCAL RULE GOVERNING THE CLAIMING AND TAXATION OF COSTS.

This Court should reject the bill of costs because Defendants did not comply with Local Civil Rule 54. LCivR 54(d)(1)(A) requires the party claiming costs to note the verified bill of costs for hearing. Further, The rule specifically requires that “The bill of costs shall be noted for hearing on a date not less than 14 days from the date of service.” LCivR 54(d)(1)(A) (emphasis added). Because Defendants did not note the cost bill for hearing on a specified date as required by the rule, costs should have been deemed waived upon the expiration of the applicable time period for claiming costs (“within 14 days after entry of judgment,”) and the cost bill should have been rejected. LCivR 54(d)(1)(A).

In any event, the rule authorized Plaintiff to file objections to the bill of costs “[o]n or before the hearing date.” LCivR 54(d)(1)(B). Defendants filed their bill of costs – without noting a hearing date – on October 2, 2018. (ECF No. 119). Plaintiff’s Objections were filed on October 16, 2018. (ECF No. 121). Under LCivR 54(d)(1)(B), Plaintiff’s Objections were timely filed.

Nevertheless, even before Plaintiff’s Objections were timely filed, the

¹ See, <http://www.waed.uscourts.gov/local-civil-rules-eastern-district-washington#rule%2054>

1 Clerk improperly approved the unnoted bill of costs. (ECF No. 120). The Clerk’s
 2 action was improper because the local rule only authorizes the Clerk to tax
 3 properly taxable costs “[a]fter the hearing date” LCivR 54(d)(1)(B)
 4 (emphasis added). Here there was no specified hearing date, and in light of “not
 5 less than 14 days” requirement, no hearing date could properly have been noted
 6 before October 16. LCivR 54(d)(1)(A). As a result, the Clerk could not properly
 7 rule on the bill of costs until sometime after October 16.
 8

9
 10 Given these multiple instances of noncompliance with the Court’s rules,
 11 the bill of costs as taxed by the Clerk of Court should be overturned, with no costs
 12 awarded.

13
 14 **II. THE CLERK IMPROPERLY AWARDED UNALLOWABLE**
 15 **COSTS – ONLY \$426 OF THE COSTS ARE ALLOWABLE.**

16 As stated by LCivR 54(d)(1)(C), the Clerk “shall tax costs which are
 17 properly taxable.” (emphasis added.) The only proper basis for allowing costs here
 18 is 28 U.S.C. § 1920. (There are no US marshals’ fees under 28 U.S.C. § 1921; no
 19 docket fees or costs of briefs under 28 U.S.C. § 1923; nor excessive costs under
 20 28 U.S.C. § 1927).

21 For the purposes of this case, the only relevant costs² that may be allowed
 22 are “the costs of making copies of any materials where the copies are necessarily
 23

² As explained in the Court’s “Bill of Costs Guide,” “exemplification costs” (also allowed under 28 U.S.C. § 1920(4)) include the costs of producing demonstrative exhibits. Defendants’ Bill of Costs do not document or claim any such costs. Bill of Costs Guide at 8, ¶ F.

1 obtained for use in the case.” 28 U.S.C. § 1920(4). As the U.S. Supreme Court
 2 explained:

3
 4 Items proposed by winning parties as costs should always be given
 5 careful scrutiny. Any other practice would . . . allow litigation costs
 6 so high as to discourage litigants from bringing lawsuits, no matter
 7 how meritorious they might in good faith believe their claims to be.
 8 Therefore, the discretion given district judges to tax costs should be
 9 sparingly exercised with reference to expenses not specifically
 10 allowed by statute.

11 *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 235 (1964). Indeed, the Court’s
 12 ruling in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987)
 13 “strictly limits reimbursable costs to those enumerated in section 1920,” and “a
 14 district court may not rely on its ‘equity power’ to tax costs beyond those
 15 expressly authorized by section 1920.” *Romero v. City of Pomona*, 883 F.2d 1418,
 16 1428 (9th Cir. 1989), *rev’d on other grounds*, *Townsend v. Holman Consulting*
 17 *Corp.*, 929 F.2d 1358 (9th Cir. 1990); *Maxwell v. Hapag-Lloyd*
 18 *Aktiengesellschaft*, 862 F.2d 767, 770 (9th Cir. 1998).

20 **A. The Evidence of Defendants’ Contractor’s Activities and Costs**

21 The party seeking costs bears the burden of “establish[ing] the amount of
 22 compensable costs and expenses to which it is entitled.” *City of Alameda v.*
 23 *Nuveen Mun. High Income Opportunity Fund*, Nos. C 08–4575 SI, C 09–1437 SI,
 24 2012 WL 177566, at *1 (N.D. Cal. Jan. 23, 2012).

25 Both of the declarations submitted by Defendants identify the same six
 26 tasks performed by Defendants’ contractor: (1) converting TIFF images to PDF;
 27
 28

1 (2) adding Optical Character Recognition; (3) electronically Bates stamping the
2 PDF images; (4) hyperlinking the PDF images to the index; (5) editing the index;
3 and (6) burning the images to DVD. ECF No. 119-1 (*Grimes Decl.* ¶ 3); ECF No.
4 119-4 (*Brubacher Decl.* ¶ 2). Notably, neither declaration claims that Defendants'
5 contractor physically copied or scanned any paper documents while "preparing"
6 the Administrative Record. ECF No. 119-1 (*Grimes Decl.*); ECF No. 119-4
7 (*Brubacher Decl.*).

8
9
10 The Clerk improperly approved the bill of costs in which the Defendants
11 lumped all of these tasks and their associated costs together. Defendants
12 inaccurately called the combined tasks "Fees for exemplification and the costs of
13 making copies of any materials where the copies are necessarily obtained for use
14 in the case[,]" and claimed as \$5,104.50 in costs (ECF. No. 120 at 1).

15
16 As explained in the Brubacher Decl., (ECF No. 119-4), the actual costs that
17 Defendants incurred for these separate tasks are reflected in three separate line
18 items in the contractor's Invoice. (ECF No. 119-3). In fact, the first five of the
19 tasks enumerated above were billed on the Invoices second line item not as "costs
20 of making copies," but as "Computer Time." See, ECF No. 119-4 ¶ 4 (*Brubacher*
21 *Decl.*), and ECF No. 119-3 (Invoice).

22
23 A review of the bill of costs and supporting documents submitted by
24 Defendants demonstrates that only \$426 of the costs sought are statutorily
25 authorized. As discussed below, while the first and third line-items of costs
26 invoiced by Defendants' contractor (see, ECF No. 119-3) are allowable, the
27 second line item – for 155.95 hours of "computer time" billed at \$30/hour –
28

1 plainly is not an authorized cost of “making copies” under 28 U.S.C. § 1920(4).

2 **B. Plaintiff does not object to paying \$426 for the allowable costs.**

3 Plaintiff does not object to paying the \$426 in costs incurred by
 4 Defendants’ contractor in making the DVD copies of the Administrative Record
 5 (AR) and Supplemental AR submitted to the Court and the parties’ attorneys.
 6 Each copy of the AR required two DVDs (see, ECF No. 76), and the
 7 Supplemental AR required one DVD. (See, ECF No 89). These allowable costs
 8 are reflected in the first- and third-line items of contractor TIS’s Invoice No.
 9 30188 (ECF No. 119-3) as follows:
 10

- 11 • \$96.00 for 4 copies of a “4.5 GB Hybrid DVD w/Hyper Index”
 12 (\$24.00/ea.); and
 13
- 14 • \$330 for 22 “duplicate copies” of the 4.5 GB “Master Disks”
 15 (\$15.00/ea.)
 16

17 (ECF No. 119-3).

18 **C. “Computer Time” is not an allowable cost.**

19 Plaintiff objects to the second line item of costs invoiced by TIS, for 155.95
 20 hours of “computer time” billed at \$30.00/hour. (ECF No. 119-3). This computer
 21 time is not a cost of “making copies” under 28 U.S.C. § 1920(4).
 22

23 Ninth Circuit precedent makes clear that “[f]ees for exemplification and
 24 copying ‘are permitted only for the physical preparation and duplication of
 25 documents, not the intellectual effort involved in their production.’” *Zuill v.*
 26 *Shanahan*, 80 F.3d 1366, 1371 (9th Cir. 1996), quoting *Romero*, 883 F.2d at 1428.
 27 In addition, organizing and coding of the administrative record or electronic files
 28

generally is clearly not amongst the statutorily allowed costs. See *Country Vinter of North Carolina, LLC v. E. & J. Gallo Winery, Inc.*, 718 F.3d 249, 258-261 (4th Cir. 2013); *Allen v. U.S. Steel*, 665 F.2d 689, 697 n.5 (5th Cir. 1982) (cost of gathering documents is not taxable); 28 U.S.C. § 1920 (enumerating taxable costs); see also *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 442-43 (1987) (costs not expressly authorized by § 1920 are presumptively precluded).

Both of Defendant's declarations specifically say they are seeking the cost of "preparation" and "finalizing" the Administrative Record. ECF No. 119-1 (*Grimes Decl.* ¶¶ 2, 3); ECF No. 119-4 (*Brubacher Decl.* ¶¶ 1-5). As noted above, neither declaration claims that Defendants' contractor physically copied or scanned any paper documents while "preparing" the Administrative Record. ECF No. 119-1; ECF No. 119-4. Under the cases, Defendants' costs for converting thousands of files from one electronic format to another, adding OCR and electronic Bates stamps, and hyperlinking and editing the record's index are simply not allowable as "making copies." Instead, the hours spent on these tasks constitute "intellectual effort" not permitted as "copy costs."

D. Defendants improperly seek to recover costs incurred for copies not "necessarily obtained for use in this case."

A failure to provide adequate documentation or detail explaining why costs were necessary is sufficient basis for denying a bill of costs. *Delehant v. United States*, 2012 WL 6455808, at *1 (D. Or. Dec. 13, 2012).

Defendants make no attempt to explain why these costs were necessary copying costs. Defendants' declarations, discussed above, do not explain how or

1 why the costs listed in the cost bill were “necessarily incurred” as required by the
2 statute. See, ECF No. 119-4; ECF No. 119-1 (identifying specific tasks, but not
3 explaining how or why the tasks were necessary as costs of making copies, as
4 listed in the Bill of Costs).

5
6 In fact, the government is required to create an administrative record for
7 any administrative action it takes—whether or not the action is challenged in
8 court. See, e.g., 5 U.S.C. §§ 556(e), 557(c). As the Supreme Court explained, “the
9 focal point for judicial review should be the administrative record already in
10 existence, not some new record made initially in the reviewing court.” *Florida*
11 *Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985). The fact that the
12 government has been sued does not render preparation of an administrative record
13 “necessary” – such preparation was already necessary. Therefore, the suit should
14 not be an opportunity for the government to recoup costs of a record it is required
15 by law to create.

16
17
18 Further, with limited exceptions the documents included in the
19 administrative record are public records, clearly available to Alliance and others
20 through the Freedom of Information Act (FOIA). 5 U.S.C. § 552 et seq.; see
21 *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975). Here Alliance
22 exercised its rights under FOIA during the NEPA process. AR 90585-86; AR
23 123545-124091. In fact, Defendants digitized and burned DVDs of much of the
24 project record in response to a FOIA request by Steven’s County Cattleman’s
25 Association, AR 077095-078269, and another request by Friends of the
26 Clearwater, AR119238-120646. As these page numbers indicate, Defendants

1 produced thousands of pages of documents that were later packaged into the
2 administrative record to the public in response to FOIA requests.

3 The agency record documents created after 2016 likely would have been
4 created in electronic form. Defendant's declarations offer no explanation for why
5 any scanning or document conversion was "necessary" in 2016/2017 despite the
6 fact that they had already produced much of the existing record in response to the
7 public's FOIA requests in electronic PDF format and at no cost to the public.
8 "[C]opies made for the convenience of counsel are ordinarily not taxable costs."
9 *Frederick v. City of Portland*, 162 F.R.D. 139, 144 (D.Or. 1995).

12 Finally, even if it were necessary for defendants to scan and convert
13 thousands of pages of record documents in 2016/2017 – and there is no record
14 evidence that such activities took place or were necessary – the costs allowed for
15 those activities must be reasonable. *Country Vintner*, 718 F.3d at 261. As
16 discussed above, the taxed costs of \$5,104.50 include \$4,678.50 for "computer
17 time" for tasks which constitute "intellectual effort," that the Defendants have
18 failed to show are necessary, and that are not otherwise recoverable costs under 28
19 U.S.C. §1920. *Zuill*, 80 F.3d at 1371.

22 CONCLUSION

23 For the reasons stated above, Alliance respectfully requests that this Court
24 deny the bill of costs. In the alternative, Alliance requests the Court to tax only
25 \$426 in allowable costs, for the cost of creating the physical copies of DVDs
26 containing the administrative record.
27
28

1 Respectfully submitted this 2nd day of November, 2018.

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4
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7
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9
10 By: s/ Richard A. Poulin
11 Richard A. Poulin (WSBA #27782)

12 *Attorneys for the Plaintiff*

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14
15
16 **CERTIFICATE OF SERVICE**

17 I hereby certify that on November 2, 2018, I electronically filed the
18
19 foregoing with the Clerk of the Court using the CM/ECF System, which in turn
20 automatically generated a Notice of Electronic Filing (NEF) to all parties in the
21 case who are registered users of the CM/ECF system.
22

23
24 s/Brian Ertz
25 Brian Ertz